Intermec Technologies Corp. v. Palm, Inc. Doc. 282 Att. 12

EXHIBIT M

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From: Lee, Alvin (Perkins Coie)
Sent: Wednesday, November 19, 2008 3:43 PM
To: 'Lester L. Levy'
Cc: Farzan, Farschad (Perkins Coie)
Subject: RE: Google - Meet and confer on Plaintiff's Discovery Responses

Lester,

In advance of our meet and confer next Monday, here is where I think we are on plaintiffs' discovery responses, including Google's position on certain of the responses.

1. As an initial matter, I am still quite surprised by the paucity of documents produced by plaintiffs. You have stated that plaintiffs have produced all responsive documents and are not withholding anything on the basis of any of their objections (save one privileged document of CLRB Hanson, plaintiffs' tax returns and documents relating to other legal actions in which they have been involved).

However, notwithstanding your assurances, plaintiffs have not produced, for example:

- Communications and documents regarding other online ads plaintiffs placed with Yahoo!, Microsoft, etc.
- Website logs that track orders and clicks for Hanson.
- All emails with Google - for both (we have some but not all).
- Plaintiffs' sales reports.
- Invoices/orders for plaintiffs' services/products offered.
- Shipping/delivery records.
- Documents relating to hosting of plaintiffs' websites.
- Profit/loss statements, balance sheets, financial summaries.

Particularly troubling is plaintiffs' failure to provide copies of communications they had with Google after they filed suit. As you know, they had a legal obligation to preserve such materials. Although Google has preserved (and produced) its own copies of those communications, I can't help but question whether plaintiffs have destroyed other relevant documents.

My concern is only heightened by your refusal to describe what efforts plaintiffs undertook to search for documents, other than to say that they searched "everywhere they thought to look." Your position stands in sharp contrast to the Google's steps to make its own document and collection efforts transparent to plaintiffs: we have told you precisely where we have searched, who we have searched and what search terms we are using. Your suggestion that we have to wait to depose plaintiffs to obtain analogous information about their production is unacceptable. Unfortunately, it appears that we are at an impasse on this issue and will be filing a motion to compel.

2. Google has requested all documents concerning any other actions to which Stern (RFP No. 75) or CLRB Hanson, its officers, directors or shareholders (RFP No. 76) were parties. [See also Interrogatory No. 11] You have asked us to limit the scope of those requests to civil actions involving moral turpitude and criminal actions. Please identify which specific actions would be excluded from plaintiffs' production

and what claims those actions involved. If you are unwilling to do so, Google will need to move to compel.

3. You confirmed that CLRB Hanson is reviewing its tax returns for any responsive information. You stated that Stern's tax returns contain responsive information but that he will not produce them because he says he is unable to segregate the non-responsive information. If he remains unwilling to provide the responsive portions, Google will move to compel.

4. All of plaintiffs' RFA responses (except numbers 7, 9, and 10) contain the conditional language that "Plaintiff responds to the best of its understanding of the request." That proviso is improper. Google will move on this issue unless you agree either to remove that language or amend the responses to explain plaintiffs' understanding of the requests, including their understanding of any terms to which they object based on vagueness and ambiguity.

5. Similarly, plaintiffs' responses to RFA Nos. 4 and 6 put the terms "realized" and "predict" in quotation marks. You said you are considering amending the responses to either remove the quotation marks or explain plaintiffs' understanding of those terms as used in those responses. Google will move on this issue if plaintiffs do not so.

6. Pursuant to your request to clarify the term "RESELLERS" as used in RFA Nos. 9 and 10, we agreed to exclude those situations where an employee of an advertiser places the ad for that advertiser. I expect that plaintiffs will now provide substantive responses.

7. You have not yet confirmed whether plaintiffs' interrogatory responses are withholding responsive information of any objection, including any of the 24 general objections. If you do not provide such confirmation, Google will move to compel.

8. You have refused to amend plaintiffs' responses to Nos. 1, 6, 10 and 12, to include all supporting facts, and you stated that you would stand on your stated objections. Accordingly, we will be moving to preclude plaintiffs from relying on any facts not disclosed in those responses.

9. You have said that plaintiffs cannot answer the interrogatories seeking quantification of their alleged damages (Nos. 2, 3 and 7) because you claim that we have not produced pausing information. As I have told you, Google has produced that information for the named plaintiffs' accounts. Specifically, it can be found at GOOG-HN 23288 to GOOG-HN 23394, and GOOG-HN 23325, 23344, 23360, 23370, 23392. I assume plaintiffs will now amend their answers to provide the quantifications of their alleged damages. If they do not, Google will move to compel.

10. Interrogatory No. 5 asks for the dates on which plaintiffs first became aware of the 120% rule. You have said that CLRB Hanson will not amend its response, but that Stern might. I believe both answers are non-responsive. Accordingly, Google will move on them if they are not amended.

11. You said that Stern might amend his response to Interrogatory No. 9 to state additional facts regarding his knowledge of those instances when he allegedly could not meet demand resulting from over-delivery credits. Google will move if he does not.

12. Interrogatory No. 13 asks why plaintiffs did not pause their campaigns when their charges exceeded their daily budget. Both plaintiffs gave identical responses: they "may not have known" at the time that their charges were exceeding their daily budget or that they "may not have had access" to their accounts at the time. I explained that these responses were inadequate. You offered to amend the responses by replacing the phrases "may not have known" or "may not have had" with "did not always have." That proposal, however, would not solve the deficiencies of the responses. It appears that we have reached an impasse, and that Google will have to move to compel further responses.

13. CLRB Hanson's response to Interrogatory No. 14 improperly uses the conditional phrase "to the extent it understands the interrogatory." You said you would consider removing that language. If CLRB Hanson does not, Google will move.

14. You said that Stern may have additional information to provide in response to Interrogatory No. 14. Please let me know if he does.

15. Neither plaintiff provided a substantive response to Interrogatory No. 15, which seeks the facts giving them standing to bring a 17200 claim. You said they might amend their responses. If they do not, Google will move to compel.

16. In response to Interrogatory No. 17, plaintiffs have refused to identify the specific portions of their contracts with Google that they contend are void or voidable. If plaintiffs continue to refuse to do so, Google will move to compel.

17. Google will move to compel if CLRB Hanson does not amend its response to Interrogatory No. 18 to provide the specific information sought about the AdWords campaigns it worked on.

I look forward to our final meet and confer scheduled for November 24, 2008 at 11:00 am Pacific time. I expect that you will have answers to the outstanding issues provided above.

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From: Lester L. Levy [mailto:LLevy@wolfpopper.com]
Sent: Monday, November 17, 2008 5:06 AM
To: Lee, Alvin (Perkins Coie)
Cc: Farzan, Farschad (Perkins Coie)
Subject: meet and confer

Alvin I have to defend a deposition today and take 5 depositions this week . All this came up at the last minute. Accordingly., I am jammed up this week. I can do the

"meet and confer " next Monday. Lester

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